FILE COPY

FILED
APR 19 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 751

EMILY V. HUBLEY, and BARBARA ANN HUBLEY, MARY CATHERINE HUBLEY and EMILY LOUISE HUBLEY, infants by EMILY V. HUBLEY, their mother, natural guardian and next friend,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL AND EWING, and GLOBE INDEMNITY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

EMILY V. HUBLEY, and
BARBARA ANN HUBLEY,
MARY CATHERINE HUBLEY and
EMILY LOUISE HUBLEY,
infants by EMILY V. HUBLEY,
their mother, natural guardian
and next friend.

By: ALL PHILIP KANE,
CHARLES V. KOONS,
1331 G Street, Northwest,
Washington 5, D. C.,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CASES CITED

STATUTES CITED

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

EMILY V. HURLEY, and BARBARA ANN HURLEY, MARY CATHERINE HURLEY and EMILY LOUISE HURLEY, Infants by EMILY V. HURLEY, their mother, natural guardian and next friend,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL AND EWING, and GLOBE INDEMNITY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

The petition of Emily V. Hurley, and Barbara Ann Hurley, Mary Catherine Hurley and Emily Louise Hurley, infants by Emily V. Hurley, their mother, natural guardian and next friend, for the issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia represents to the Honorable Court as follows:

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioners are the widow and infant children of George F. Hurley, deceased, a Washington, District of Columbia, lawyer who died as a result of injuries which he sustained on December 13, 1945, when he slipped and fell down six stairs in a Boston, Massachusetts, restaurant to which he had gone for the purpose of obtaining his evening meal while in Boston on the businesss of the law firm by which he was employed (R. 6).

This case had its origin in a claim for compensation for the death of George F. Hurley under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 USCA §901 et seq. as made applicable to the District of Columbia by the Act of May 18, 1928, 45 Stat. 600, District of Columbia Code § 36-501 et seq., 1940 edition (R. 9).

The Deputy Commissioner (Lowe) rejected the claim for compensation (R. 10). Thereupon the claimants sought judicial review in the District Court of the United States for the District of Columbia by means of a complaint seeking to set aside the rejection of compensation on the ground that it was not in accordance with law and requesting a mandatory injunction to require the defendant, Lowe, to award compensation (R. 1). The District Court dismissed the complaint for failure to state a cause of action upon which relief could be granted (R. 14) and the United States Court of Appeals for the District of Columbia reluctantly affirmed (R. 15-19).

There was no oral testimony taken before the Deputy Commissioner, the case having been submitted upon a Stipulation and Supplemental Stipulation (R. 6-8).

The stipulated evidence showed that Hurley was a paid employee of Feldman, Kittelle, Campbell and Ewing, a Washington, D. C., law firm and that he left Washington on the morning of December 12, 1945, on a trip which

was to consume at least three days. His trip was taken in connection with his employers' business. His travel schedule contemplated a conference in New York on December 12, two conferences in Boston on December 13 and his attendance at a trade association meeting in Holyoke, Massachusetts, on December 14. (R. 6-8).

The evidence significantly showed that the clients of Mr. Hurley's employers paid all proper business expenses in connection with his trips (R. 7).

The evidence further showed that Hurley kept his New York appointment and proceeded to Boston in accordance with schedule. One of his appointments in that city was cancelled. He kept the other appointment, however, and had a telephone conversation with the party whose appointment had been cancelled (R. 6).

The person with whom Hurley kept his appointment on December 13 was C. Keefe Hurley, a Boston lawyer, who was a friend but not a relative of the decedent. (R. 6-7). During the course of their conversation, C. Keefe Hurley invited George F. Hurley to have luncheon with him that afternoon or dinner with him at his home that evening; but George F. Hurley declined the said invitations saying that he would be busy during the afternoon, that he had an appointment in Holyoke the following day and that he was going to have dinner with his own mother and father (who lived in nearby Dorchester) in town that evening. (R. 7-8).

George F. Hurley did have dinner with his parents at a North Boston oyster house on December 13. There were no clients or any other persons present at the dinner. At about 6:30 o'clock that evening Hurley's father, aged 81, left the table, at which they were eating, to go to the men's room in the basement of the restaurant. George F. Hurley accompanied his father for the purpose of assisting him down a short flight of steps. While thus engaged, the decedent slipped and fell down six steps, striking his head on the cement floor and sustaining in-

juries which resulted in his death nine hours later. (R. 7).

The Deputy Commissioner found that Hurley was an employee and that the petitioners were his dependent survivors but found "that the *dinner* which occasioned deceased's presence in the restaurant at the time of his injury was not related to his employment but was of social character and that his injury and death was not the result of an accidental injury wrich arose out of and in the course of his employment." (R. 10). (Emphasis supplied).

The District Court dismissed the complaint filed under Section 21 (b) of the Longshoremen's and Harbor Workers' Act in which the petitioners had asserted that the Deputy Commissioner's "Compensation Order and Rejection of Claim" was not in coformance with law. Petitioners then appealed to the United States Court of Appeals for the District of Columbia.

In the course of its opinion that Court stated:

> "As a matter of unweighted impression, we are of opinion that the Deputy Commissioner was in error upon the legal principle involved in his inference from the basic facts. The "course of employment" on a specified arrand, ordered by an employer, to a place different from the regular place of employment, includes all the ordinary incidents of the errand which the employer would normally contemplate as occurring in the course of it. Thus, when the employing firm sent this lawyer, otherwise engaged in practice in the District of Columbia, on a business trip for specific purposes, all the natural incidents of that trip which would be contemplated by the employer, such as the eating of meals in ordinary places at ordinary times, were in the course of that employment. This is not only the normal concept established in the business world, but fits the intent of the law as to coverage against injury.
>
> "We do not mean to imply that anything that an employee might do while on an errand would be in the course of his employment. Any activity which would not normally be contemplated by the employer as incident to the errand, would not be in the course of em-

ployment. But an ordinary dinner with one's father and mother in a restaurant, when in their neighborhood on a business errand, would not be such an affair." (R. 17).

Notwithstanding this statement by the Court of its beliefs that the petitioners were properly entitled to compensation under the law, that the Deputy Commissioner was in error in holding that the "dinner which occasioned the decedent's presence in the restaurant at the time of his injury was of social character and that his injury and death was not the result of an accidental injury which arose out of and in the course of his employment," and notwithstanding its opinions that the reviewing Court must determine all questions of law, that is, "must determine whether the Deputy Commissioner applied the correct principles, or law to the facts" (R. 16) and that the Court should reverse the Deputy Commissioner if he had improperly applied the law to the facts of the case, (R. 16) it nevertheless affirmed the District Court solely and exclusively upon the asserted authority of *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947).

The Court below concluded its opinion with the following language:

> *"If we are in error in our understanding of the Cardillo case, we hope the error will be corrected by further expression by the Supreme Court. The statute involved is national in scope and the question is of considerable importance."* (R. 18). (Emphasis supplied).

B. STATEMENT REGARDING BASIS OF THIS COURT'S JURISDICTION.

The petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code as Amended (Act of March 3, 1891, c. 517, §6, 26 Stat. 828; March 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229 §1,

43 Stat. 938, Jan. 31, 1928, c. 14 §1, 45 Stat. 24; June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. A. §347 (a).

The petitioners submit that this case is one in which this Court should grant certiorari in accordance with the suggestions, limitations and indications contained in Rule 38 (5) (c) of the Supreme Court of the United States, since the United States Court of Appeals has, in this case,

1) decided a question of *general* or, to use the language of the Court of Appeals, of *considerable* importance;

2) decided a question of substance relating to the construction or application of a statute which has not but should be settled by this Court; and

3) failed to give proper effect to this Court's decision in *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947);

4) failed to follow the provisions of the Administrative Procedure Act respecting judicial review (Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U. S. C. A. 1009).

Furthermore, the Court of Appeals in its opinion has clearly indicated the need for an opinion from this Court which would clarify the law and serve as a guidepost for the District Courts and Circuit Courts of Appeal. (R. 18).

C. QUESTIONS PRESENTED.

1. Was the finding of the Deputy Commissioner "in accordance with law"?

2. Has the Court of Appeals erroneously interpreted the phrase "if not in accordance with law" which appears in Section 21(b) of the statute?

3. Has the Court of Appeals misinterpreted the decision of this Court in *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947) by substituting the words "forbidden by law" for the

words "if not in accordance with law" and by then giving the word "forbidden" the meaning of a positive prohibition or interdiction?

4. Does not the opinion of the Court of Appeals show the existence of such a state of confusion respecting the meaning of the phrase "if not in accordance with law" as to require this Court to render an opinion clarifying the meaning of that language?

5. Can a finding of a Deputy Commissioner be "in accordance with law" if it is not supported by any evidence whatever?

6. Can a finding of a Deputy Commissioner be "in accordance with law" if, by the application of correct legal principles, the finding is clearly wrong?

7. Did the finding of the Deputy Commissioner deprive the claimants of the benefit of the presumptions to which they are entitled under Section 20 (a) of the Longshoremen's and Harbor Workers Act, 33 U. S. C. A. §920 (a)?

8. Does a District of Columbia employee who is required by the exigencies of his employment to remain overnight in a city distant both from the regular situs of his employment and from his home, who is to be reimbursed from the expenses incident to his travels, who seeks his meals, while in the distant city, in a public restaurant, lose the protection of the District of Columbia Workmen's Compensation Act by reason of the single fact that the persons who happen to sit at the same table with him in that restaurant are his aged parents?

9. Does the decision of the Court of Appeals violate the provisions of Section 10 of the Administrative Procedure Act of June 11, 1946, c. 324 §10, 60 Stat. 243, 5 U. S. C. A. 1009?

D. REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

The petitioners submit that the Court of Appeals has erroneously interpreted the phrase "if not in accordance with law" as used in Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1436, U. S. C. A. §921 (b) and that certiorari should be granted to correct that error.

The error of the Court of Appeals is not a simple solecism but, if followed, would effectively deny all or substantially all right to judicial review of compensation orders. It constitutes an open invitation for arbitrary action by Deputy Commissioners.

The petitioners submit that the Court of Appeals, in its opinion in the instant case has tortuously twisted the phrase "if not in accordance with law" into one meaning "if not forbidden by law." It then reads into the words "forbidden by law" a requirement of a positive prohibition or interdiction. It bases this tortured construction of the law on an erroneous interpretation of the decision of this Court in *Cardillo* v. *Liberty Mutual Insurance Company, supra.* There is no justification in the statute or in the *Cardillo* opinion which supports this interpretation or condones the unjust results which it creates.

The petitioners submit that the Deputy Commissioner's finding was *not in accordance with law.* The stipulated evidence clearly showed that the deceased was in Boston on the business of his employers. It followed as a matter of practical necessity that he would find his meals in that city. There was not a single fact in the record which would warrant a finding that Hurley had departed from the course of his employment at the time he sustained his injuries. Consequently, the Deputy Commissioner was obviously wrong in making a finding that there was no relation between the injury and the employment and this finding could not be "in accordance with law."

The petitioners further submit that the facts of this case were such as not to afford the Deputy Commissioner any choice of possible inferences. The facts were such that all reasonable men properly instructed upon the law would be required to come to the one conclusion, namely, that Hurley was acting in the course of his employment at the time of his injury and that his injury arose out of his employment. When such is the condition of the evidence the Deputy Commissioner is "forbidden" by law to make a contrary inference.

The petitioners also direct the Court's attention to the fact that the Deputy Commissioner's finding and the Court of Appeals decision both do violence to the statutory mandate that "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter." 33 U. S. C. A. §920. Certiorari should be granted to require that the Act be administered in accordance with its intendment.

Finally, the Court failed to follow the mandate of the Administrative Procedure Act that a reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the applicability of the terms of any agency action," and that it shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence in any case . . . reviewed on the record of an

agency hearing provided by statute (Act of June 11, 1946, c. 324, §10, 60 Stat. 243, 5 U. S. C. A. 1009).

EMILY V. HURLEY, and
BARBARA ANN HURLEY,
MARY CATHERINE HURLEY and
EMILY LOUISE HURLEY,
infants by EMILY V. HURLEY,
their mother, natural guardian
and next friend.

By: AL. PHILIP KANE,
CHARLES V. KOONS,
1331 G Street, Northwest,
Washington 5, D. C.,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

EMILY V. HURLEY, and BARBARA ANN HURLEY, MARY CATHERINE HURLEY and EMILY LOUISE HURLEY, Infants by EMILY V. HURLEY, their mother, natural guardian and next friend,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL AND EWING, and GLOBE INDEMNITY COMPANY, a corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

General.

This Court clearly has jurisdiction to hear and determine the matter under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. § 347(a).

The question, although it arises in form under the District of Columbia Compensation Act nevertheless involves the interpretation of the Longshoremen's and Harbor Workers' Act, which is a statute of national application

and importance. The question is of sufficient importance to justify and require the intervention of this Court on certiorari.

Del Vecchio v. *Bowers,* 296 U. S. 280, 80 L. ed. 229, 56 S. Ct. 190 (1935).

OPINION BELOW (R. 18).

1. The Court of Appeals clearly indicated in its opinion that it was of the view that the Deputy Commissioner was in error upon the legal principle involved in his inference from the basic facts. (R. 17).

The Court also said that it thought that the Deputy Commissioner was in error as to the legal content of the term "in the course of employment." (R. 18).

If he is in error as to the legal principle involved and as to the legal content of the term "in the course of his employment," how can it be said that his decision is in "accordance with law"? If his finding is "not in accordance with law" it may be set aside by the reviewing Court.

44 Stat. 1424, 33 USCA §921;

District of Columbia Code §36-501 et seq. (1940 ed.);

Anniston Manufacturing Co. v. *Davis,* 301 U. S. 337, 344, 352, 81 L. ed. 1143, 57 S. Ct. 816 (1937);

60 Stat. 243, 5 U. S. C. A. 1009.

2. In a suit to set aside a compensation order the Court has the duty of determining from the record whether the evidence before the Deputy Commissioner will support his finding.

60 Stat. 243, 5 U. S. C. A. 1009.

3. The Court of Appeals has seriously misconstrued this Court's decision in the case of *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U. S. 469, 91 L. ed. 743, 67 S. Ct. 801 (1947).

In the first place the Court failed to draw the necessary distinction between a case where the Deputy Commissioner, aided by the presumptions of §20 of the Longshoremen's and Harbor Workers' Act, allows compensation and one where he denies compensation.

See 91 L. Ed. 743, 746.

In the *Cardillo* case, this Court said that Deputy Commissioner is charged with the duty of *initially* selecting the inference which seems most reasonable and his choice *if otherwise sustainable* may not be disturbed by a reviewing Court (91 L. ed. 748). The Court of Appeals decision ignores the word "initially" and the phrase "if otherwise sustainable." It also assumes, contrary to the fact in this case, that the facts permitted the drawing of diverse inferences.

It is true that this Court said in the *Cardillo* case that "the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by law" but it is true also that this Court qualified the use of the word "forbidden" in the next succeeding paragraph of the *Cardillo* opinion when it said "If there is factual and legal support for that conclusion, our task is at an end" (91 L. ed. 749).

The *Cardillo* case does not, therefore, represent any new departure from established interpretations. It means that the Deputy Commissioner's findings must have both legal and factual support. In its opinion the Court of Appeals points out that the finding in this case does not have legal support (R. 16-18). The petitioners say that the Court should, therefore, have entered an order of reversal.

5. The petitioners say that not only is legal support lacking for the Deputy Commissioner's finding but also that there is no factual support for it. This case presents no narrow question of exceptions to the rule of *Voehl* v. *Indemnity Company of North America*, 288 U. S. 162, 77 L. ed. 676, 53 S. Ct. 380, 87 ALR 245, such as did the

Cardillo case, but presents a situation where the Court can clearly find that the Deputy Commissioner is wrong as a matter of law.

6. In this case, unlike the *Cardillo* case, there are at least three formal principles of law which would invalidate the choice which the Deputy Commissioner made. The first of these principles is well expressed in *Thornton* v. *Hartford Accident & Indemnity Co.*, 198 Ga. 786, 32 S. E. 2d 816 (1945), in this language:

> "The eating of meals, while a pleasure indulged in by a traveling salesman and all mankind, is as necessary to the coninuance of his duties as the breath of life; and where his duties take him away from his home, his acts of ministration to himself should not—and we believe do not—take him outside the scope of his employment so long as he performs these acts in a normal way and prudent manner."

The second principle is the language of 33 U. S. C. A. §920 which to the effect that *it shall be presumed* in the absence of *substantial evidence to the contrary* that the claim comes within the provisions of the law.

The third principle is found in the provisions of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U. S. C. A. 1009.

6. The evidence clearly placed Hurley in the course of his employment. There was no substantial evidence to the contrary before the Deputy Commissioner. The Deputy Commissioner was, therefore, violating a formal principle of law in holding that the injury was not sustained in the course of and did not arise out of the employment. The Deputy Commissioner improperly deprived the petitioners of the benefit of the presumption which the law erects in their favor.

7. The Massachusetts Court has recently said

> "Whether the employee's injury arose out of and in the course of his employment was a question of fact

to be decided by the board, but in making its decision it was required to apply correct principles of law."
James Bradford's case, 319 Mass. 621, — N. E. 2nd — (1946).

In the *Thornton* case, *supra,* the reviewing court had to reverse a lower court in order to grant compensation. The facts of that case were very similar to those in the instant case.

Under the law of the District of Columbia, Hurley was protected by the Act while in the Boston restaurant.

Employer's Liability Assurance Corp. v. *Hoage,* 63 App. D. C. 53, 69 F. 2d 227 (1934);
Cardillo v. *Hartford Accident & Indemnity Co.,* 71 App. D. C. 330, 109 F. 2d 674 (1940);
B. F. Goodrich v. *Britton,* 78 U. S. App. D. C. 221, 139 F. 2d 362 (1943);
Ward v. *Cardillo,* 77 U. S. App. D. C. 343, 345, 135 F. 2d 260 (1943).

He would also be protected under general compensation principles:

Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), p. 170;
Lepow v. *Lepow Knitting Mills,* 288 N. Y. 377, 43 N. E. 2d 450 (1942);
Souza's Case, 316 Mass. 332, 55 N. E. 2d 611 (1944);
Mason-Waller Motor Co. v. *Holeman,* 284 Ky. 374, 144 S. W. 2d 796 ( );
Texas Employers Insurance Assn. v. *Cobb,* 118 S. W. 2d 375 (Texas Civ. App. 1938);
California Casualty Indemnity Exchange v. *Industrial Accident Commission,* 53 Pac. 2d 758 (1936);
Thiede v. *Searle,* 278 Mich. 108, 270 N. W. 234 (1936);
Jeffers v. *Borgen Chevrolet Co.,* 272 N. W. 172 (1937);

Caster v. *Hodges,* 132 S. W. 2d 211;
Watson v. *Marshall's U. S. Auto Supply, Inc.,* 186 S. W. 2d 556 (Missouri 1945);
Marks' Dependents v. *Gray,* 251 N. Y. 90, 167 N. E. 181 (1929);
Tushinsky v. *National Broadcasting Co.,* 265 App. Div. 301, 38 N. Y. S. 2d 608 (1942);
Dyviniek v. *Buffalo Courier Express,* — N. Y. —, 73 N. E. 2d 552 (1947).

The petitioners submit that the Deputy Commissioner disregarded the District of Columbia decisions aforesaid and that his finding was contrary to law. If Hurley's eating in a public restaurant was an incident of his employment, as the petitioners claim and as the foregoing cases show, it is an incidental circumstance of no importance that it was his parents rather than a stranger, a casual acquaintance, a friend, or even a client who occupied the other chairs at the table. The Deputy Commissioner was clearly in error in failing to follow the law of the District of Columbia. The Court of Appeals recognized the error but felt that its power to reverse had been destroyed by this Court's decision in the *Cardillo* case.

CONCLUSION.

This Court should grant the writ of certiorari, reverse the decision of the Court of Appeals and order that compensation be awarded the petitioners.

Al. Philip Kane,
Charles V. Koons,
Attorneys for Petitioners,
1331 G Street, Northwest,
Washington, D. C.